Supreme Court, U. S.
FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-504

J. J. ENOMOTO, et al.,
Appellants
vs.
JAMES C. WRIGHT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

B. E. BERGESEN, III
Office of the State Public Defender
1390 Market St., Suite 425
San Francisco, CA 94102
Telephone: (415) 557-1600

SIDNEY M. WOLINSKY
WILLIAM G. HARRIS
Public Advocates, Inc.
433 Turk Street
San Francisco, CA
Telephone: (415) 441-8850

BERNARD ZIMMERMAN
225 Bush Street
San Francisco, CA 94104
Telephone: (415) 983-1179

JAMES F. SMITH
University of California School of Law
Davis, CA 95896
Telephone: (916) 752-6943

INDEX

	PAGE
Question Presented	1
Statute and Regulations Involved	2
The Nature of the Case and the Record Below	3
Argument	13
I	
CALIFORNIA LAW AFFORDS A STATE PRISONER THE RIGHT NOT TO BE PLACED IN SEGREGATED CONFINEMENT UNLESS HE POSES A THREAT TO HIMSELF OR TO OTHERS, A RIGHT WHICH IS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	15
II	
THE MATERIAL FACTS UPON WHICH THE LOWER COURT'S DECISION IS BASED WERE UNCONTROVERTED BY DEFENDANTS	27
CONCLUSION	37

TABLE OF AUTHORITIES CITED

Cases	Page
Allen v. Nelson 354 F. Supp. 505 (N.D. Cal.) aff'd 484 F.2d 960 (9th Cir. 1973)	23
Antonio v. Barnes 464 F.2d 584 (4th Cir. 1972)	32
Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co. 284 U.S. 370 (1932).	20
Bell v. Burson 402 U.S. 535 (1971)	9
Bishop v. Wood 426 U.S. 341 (1976)	24
Camico v. Secretary of Hous. & Urb. Dev., 509 F.2d 694 (2d Cir. 1974)	21
Carlo v. Gunter 520 F.2d 1293 (1st Cir. 1975)	23
Englehard Industries, Inc. v. Research Instrumental Corporation, 324 F.2d 347 (9th Cir. 1963)	29
Gilmore v. Lynch 400 F.2d 288 (9th Cir. 1968)	19
Goss v. Lopez 419 U.S. 565 (1975)	9,15,16
Gray v. Creamer 465 F.2d 179 (3d Cir. 1972)	23

Joy v. Daniels,
479 F.2d 1236 (4th Cir. 1973) 17

Landman v. Royster
333 F.Supp. 621, 645 (E.D.Va. 1971) . . . 23

Meachum v. Fano,
427 U.S. 215 (1976) 16,26

Minneapolis-Honeywell Regulator
Co. v. Midwestern Instruments, Inc., .
188 F.Supp. 248 (N.D.Ill. 1960)
aff'd, 298 F.2d 36 (7th Cir. 1961) . . . 15

Montayne v. Haymes
427 U.S. 236 (1976) 16,17

Perry v. Sindermann
408 U.S. 593 (1972) 15,16,26

Suckle v. Madison General Hospital
499 F.2d 1364 (7th Cir. 1974) 22

Runyon v. McCrary,
427 U.S. 160 (1976) 24

Sound Ship Building Corp. v.
Bethlelem Steel Co.,
533 F.2d 96 (3rd Cir. 1976) 29

Wolff v. McDonnell
418 U.S. 539 (1974) . . . . . passim

Codes

Title 15, California
Administrative Code, Section 3330 . .2,18,19

California Penal Code, Section 2600 . . 2,17

Rules

Rules of the United States
Supreme Court, Rule 16 1,26

Federal Rules of Civil Procedure
Rule 52 5,14,15,29
Rule 56 . . . . . passim
Rule 59 5,14,15,29
5,14,15,29

Texts

6A Moore's Federal Practice
Section 59.07 14,15

10 Wright & Miller, Federal
Practice & Procedure 14,32

Inmate Classification Manual
Section 405. 21,22
Section 406. 21
Section 601. 2,19
Section 602. 3,19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-504

J. J. ENOMOTO, et al.,

Appellants,

vs.

JAMES C. WRIGHT, et al.,

Appellees.

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Does California law, which sets forth specific criteria which must be met before a prisoner may be placed in segregated confinement, create a liberty interest which is protected by the Due Process Clause of the Fourteenth Amemdment?

STATUTE AND REGULATIONS INVOLVED

California Penal Code.

> Section 2600. "A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights and only such rights as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."

California Administrative Code, Title 15.

> Section 3330. "General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken."

California Department of Corrections, Inmate Classification Manual.

> Section 601. "Placement Criteria. (a) When an inmate cannot be main-

tained in a general population without proving to be a serious threat to the staff, other inmates, himself or the general welfare of the institution, assignment to a security housing unit should be made. Such an assignment is a serious last resort and should be made only after all other departmental and institution resources have proven ineffective or are clearly inapplicable.

* * * * *

Section 606. "Criteria for Security Housing Placement. The following criteria is a working guide when considering placement of inmates in security units. (a) The inmate presents a threat due to assaultive history or is aggressively acting out or threatening aggressive behavior. (b) The inmate presents an escape risk of unusual seriousness or persistence. (c) The inmate has requested and/or appears to require protective custody. (d) The safety and security of the institution will be threatened if the inmate is not placed in a restrictive setting."

THE NATURE OF THE CASE AND THE RECORD BELOW

In granting plaintiffs' motion for partial summary judgment, the three-judge District Court held that state prisoners have a liberty interest, protected by the Due Process Clause of the Fourteenth Amend-

ment, in not being placed in segregated confinement for "administrative" reasons without first being afforded certain procedural safeguards. This liberty interest was based upon two sources, the first being the Due Process Clause itself, and the second being the state's own administrative regulations. By this motion, appellees urge this Court to affirm the decision of the District Court on the second ground, since the court below was plainly correct in concluding that California's statewide regulations "define the circumstances under which an inmate may be confined in maximum security for administrative reasons." See Petitioners' Jurisdictional Statement (hereinafter "JS"), Appendix at 15. It is our submission that this question, which is essentially one of state law, is not substantial enough to warrant plenary consideration by this Court.

The record upon which the lower court's judgment was based consists essentially of (1) copies of the pertinent administrative regulations, (2) 50 affidavits and two depositions submitted by plaintiffs, and (3) two affidavits submitted by defendant Raymond K. Procunier, then Director of the California Department of Corrections (hereinafter the "CDC"). Subsequent to the court's entry of partial summary judgment, defendants submitted the affidavits of four prison wardens in support of defendants' motions for reconsideration and for a new trial pursuant to Rules 52 and 59, F.R.Civ.P. As the court below noted (see JS 6, 8, 12, 17), virtually all of plaintiffs' evidence was uncontroverted by defendants and the few factual allegations which are material to resolution of the instant motion to affirm are simply not in dispute. See Section II, infra.

Only four findings of fact were essential to support the judgment below on the state-created right rationale, and all four were supported by substantial evidence which was not controverted by defendants. Those facts are (1) that the conditions of confinement in segregation are significantly more onerous than those in the general population; (2) that prisoners are in practice confined in segregation for vague and subjective reasons and for lengthy periods of time; (3) that the classification hearings actually afforded prisoners are inadequate to insure reliable and fair decision-making; and (4) that the minimal protections ordered by the court below--which are those mandated in Wolff v. McDonnell, 418 U.S. 539 (1974)--are essential to protect the right at issue and will not jeopardize prison security. We briefly summarize the evidence on each of these four points prior to our discus-

sion of the applicable state law.

1. Conditions in Segregated Confinement [1/]

Prisoners in segregation are confined in small cells for 23 or more hours per day (Pl. Ex. 4,7,25). These cells are filthy, and are infested with vermin, roaches and rats (id., 1,4,7). Often the cell area stinks (id., 1,7,8). Because prisoners can communicate with each other only by shouting between cells, the noise level is frequently intense (id., 1,8,14,19). Prisoners must eat in their cells, get limited exercise, and cannot freely participate in vocational or educational programs (id., 2, 4,6). They wear shackles during visits with family and friends, a practice which

[1/] References in this subsection to particular affidavits are for illustrative purposes only; in most instances, numerous other affidavits also document the same particular condition.

is so painful that in some cases the visits have ceased altogether (id., 8,10, 12,14,19). Prisoners in segregation have been subject to beatings and frequent tear gassing by guards (id., 9,12,14,15). The likelihood that a prisoner will be released on parole while he is confined in segregation is greatly diminished (id., 30,31,34; Deposition of Huel Morphis, pp. 44-45). And expert psychiatric testimony was to the effect that such confinement

> "may cause permanent psychological, if not, indeed, physical damage. If prolonged, it may even destroy the capacity of prisoners to lead a normal life after release." JS, Appendix at 7 n.4 (opinion below); see Pl. Ex. 48,53.

These facts, which remain uncontroverted even if defendants' evidence is viewed most indulgently, are more than sufficient to show that segregated confinement imposes such severe consequences that by no stretch of the imagination could a

prisoner's right to remain free of them be termed de minimis. Compare Goss v. Lopez, 419 U.S. 565 (1975) (10 day suspension from public school); Bell v. Burson, 402 U.S. 535 (1971) (loss of driver's license).

2. Reasons for and Length of Segregated Confinement

Segregated confinement is authorized when a prisoner presents a threat to himself, to other inmates or to staff. See Section I, infra. Yet the specific reasons assigned by prison officials to justify such decisions are inordinately vague and subjective. For example, the record shows that inmates have been segregated for suspected "association" with particular inmates or inmate groups (e.g., Pl. Ex. 29, 32,37); for being "militant" (id.,.8,19); for "arrogance" (id., 10); for a "bad attitude" (id., 56); for being "disruptive" (id., 11); for "institutional convenience"

(id., 26); for being a "trouble maker" (id., 33) or "dangerous" (id., 38,43), or a "threat to staff" (id., 40). In some cases, such charges were prosecuted "administratively" after a District Attorney had refused to prosecute those charges criminally, and/or a prison disciplinary committee had refused to convict on them (id., 2,10,14,21,30,31,41). And some prisoners professed to have no idea why they were in segregation (id., 20,22). Most did not know when they would be released from segregation, and many complained that they did not know what, if anything, they could do to obtain their release (id., 30-32). Unlike "disciplinary" segregation, which is limited to 10 days, "administrative" segregation can continue for long periods of time--for months and even years--and at least eleven of plaintiffs' affiants had spent more than a year in segregation at the

time they executed their affidavits (see id., 2,3,5,11,20,21,22,24,25,30,34.

3. The CDC's Procedures for Ordering Segregated Confinement

Most of the 46 inmate affiants described in detail the "vargaries and irregularities of defendants' practices" in placing prisoners in segregation. JS, Appendix at 8 (opinion below). Virtually every affidavit discloses, as do the four summarized by the court below (JS, Appendix at 8-11), the perfunctory and pointless nature of these "hearings", and the pervasive failure of defendants to give timely notice or adequate reasons for segregation decisions. Not a single one of these affidavits was controverted by defendants, who were content to submit a description by defendant Procunier of what the appropriate classification regulations required.

/

/

4. The Procedures Mandated by the Court Below are Essential and Reasonable

The procedures ordered into effect by the court below are those set forth by this Court in Wolff v. McDonnell, supra. Based upon the arbitrary practices documented in the record, the court below properly found that "[t]hese minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivations of confinement in maximum security." JS, Appendix at 16, 17 (opinion below). As the District Court noted, defendants "made no showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimum protections called for by Wolff in the case of disciplinary sanctions." JS, Appendix at 16.

To the contrary, defendant Procunier's affidavit asserted that even prior to Wolff the CDC's disciplinary regulations "were interpreted in a manner which met the requirements of Wolff." Affidavit of Raymond K. Procunier, dated September 24, 1974 (hereinafter the "Procunier Affidavit") at 5. And plaintiffs' "expert testimony--not controverted--indicate[ed] that implementation of fair procedures decreases tensions in prisons and eases the work of prison administrators." JS, Appendix at 17 (opinion below).

ARGUMENT

One of the two grounds upon which the District Court placed its decision involved its interpretation of state regulations, and it is upon this ground that appellees base the instant motion to affirm. In our view, this question not only was correctly decided below, but is so unsubstantial as not to warrant further argument in this Court. Also insubstantial--and indeed specious, in light of the record below--is appellants' claim that the material facts upon which the District Court's judgment was based were controverted within the meaning of Rule 56, F.R.Civ.P. We therefore urge this Court to affirm the judgment of the District Court on the state law ground, thereby making it unnecessary to reach the larger constitutional question tendered by appellants in their Jurisdictional Statement. 2/

2/ Defendants have also appealed from the decision below denying their motion for reconsideration under Rules 52(b) and 59, F.R.Civ.P. Such motions, which are addressed to the trial court's discretion, see 6A Moore, Federal Practice ¶59.07 at p. 59-99, are not designed to permit relitigation of old matters, but to correct manifest error or present newly discovered evidence. See Moore, Federal Practice, supra; Wright & Miller, Federal Practice & Procedure, §§2582, 2805. Such motions cannot be used, as appellants have here attempted, to obtain a rehearing of the merits merely because counsel failed to present their strongest case at the original hearing. See, e.g.,

I

CALIFORNIA LAW AFFORDS A STATE PRISONER THE RIGHT NOT TO BE PLACED IN SEGREGATED CONFINEMENT UNLESS HE POSES A THREAT TO HIMSELF OR TO OTHERS, A RIGHT WHICH IS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Recent decisions of this Court hold that where state law has created a property or liberty interest a person may not be deprived of it in violation of the Due Process Clause. Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972). This rule, which applies to all State created rights except those of a de minimis nature, Goss v. Lopez, supra, applies to prisoners as well as to ordinary citizens. Wolff v. McDonnell, supra; see Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976).

Minneapolis-Honeywell Regulator Co. v. Midwestern Instruments, Inc., 188 F. Supp. 248 (N.D. Ill. 1960), aff'd, 298 F.2d 36 (7th Cir. 1961); Moore, Federal Practice, supra. Since none of the grounds for amendment of findings or for a new trial was present in this case, the District Court clearly did not abuse its discretion in denying appellants' motions under Rules 52(b) and 59.

This Court has also identified two basic ways in which states may create a property or liberty interest. The first is "by statute, by rule or regulation, or by interpretation of their own constitutions." Meachum v. Fano, supra, 427 U.S. at 229; accord: Goss v. Lopez, supra. The second is through a "mutually explicit understanding," whereby a course of conduct, over time, gives rise to a protected right if it creates a reasonable expectation or a "common law" within a particular institution. Perry v. Sindermann, supra, 408 U.S. at 601; cf. Meachum v. Fano, supra, 427 U.S. at 216 (referring to "state law or practice"). Thus in withholding due process rights with respect to inter-prison transfers, this Court held that a Massachusetts prisoner

had "no right to remain at any particular prison and no justifiable expectation that he would not be transferred unless found guilty of misconduct." Montayne v. Haymes, supra, 427 U.S. at 243 (emphasis supplied).

In California, however, prisoners do possess a state-created right not to be placed in segregated confinement "except for misbehavior or upon the occurrence of other specified events." Id. at 242. This right rests upon both state regulations and past prison practices which reflect a common law within that institution. It also rests upon the basic policy which the California legislature expressed when, in 1975, it amended Section 2600 of the Penal Code to provide that a state prisoner may "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined***." Cf. Joy v. Daniels, 479

F.2d 1236 (4th Cir. 1973).

Looking first to the regulations, the court below found Section 3330 of the California Administrative Code to "define the circumstances under which an inmate may be confined in maximum security for administrative reasons." JS, Appendix at 15. That section provides that inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons; that they must be segregated when it is reasonably believed that they are a menace to themselves or others or a threat to the security of the institution; and that clearly documented reasons must be given at the time such action is taken. Ibid. "Thus, the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the

standard set by the rules." Id. at 16.

There is, moreover, additional support in the record for the ruling of the District Court. For in addition to Section 3330, supra, Sections 601(a) and 606 of the CDC Classification Manual set forth specific criteria which prison officials must observe in placing a prisoner in segregated confinement. [3] Thus Section 601(a) provides that a prisoner is to be segregated if he is "a serious threat to staff, other inmates, himself, or the general welfare of the institution." As the then Director of the Department of Corrections put it:

> "An inmate may be placed in a security housing unit only when he cannot be maintained in a general population without posing a serious threat to staff, other inmates, himself, or the general welfare of the institution. Such placement is a serious last resort and should be made only after all other departmental and institutional resources have proven ineffective or are clearly inapplicable." Procunier Affidavit, supra, at 1-2 (emphasis added).

Since it is elementary that an agency must adhere to its own regulations, see Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370 (1932), it follows that a prisoner may be segregated only if it is reasonable to believe that he meets one or more of these criteria.

Furthermore, California has acknowledged that "involuntary assignment to a security housing unit by a classification committee" is an action having a "substantially adverse effect" on the conditions of a prisoner's confinement, and has adopted certain "fairness procedures" to be

---

[3] See pages 2-3, supra. According to the Director of the CDC, "[t]he procedures in this manual are regulations and administrative orders which are to be applied in every institution in the California Department of Corrections and so are of statewide application." Procunier Affidavit, at 1. See also, Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

followed before such a decision can be made. CDC Classification Manual, supra, Sections 405, 406. [4] It has also made such decisions subject to its inmate appeals procedure, thereby affording prisoners the right to contest such decisions through administrative channels. Procunier Affidavit, supra, at 4-5. It is difficult to imagine how an inmate can "prepare a defense against the proposed [classification] action," Classification

[4] In initially promulgating these regulations, the CDC stated that its purpose was "to increase the fairness and validity of classification actions where the action under consideration may have a substantial adverse impact upon the inmate in question." See Defendants' Supplemental Opposition to Motion for Partial Summary Judgement, Exhibit A. Thus it is clear that, contrary to appellants' claim (see JS at 15), prisoners as well as prison staff members are intended beneficiaries of these and related regulations involving transfers to segregated confinement. Such a factor militates in favor of finding a state created right in favor of a person who is intended to be benefited thereby. See, e.g., Camico v. Secretary of House & Urb. Dev., 509 F.2d 694, 700 (2d Cir. 1974).

Manual, supra, Section 405(c), or submit a meaningful appeal from such an action, unless he can base such a defense or appeal upon a right not to be segregated unless one or more of the foregoing criteria exists. Although we do not contend that the mere presence of some procedural protections denotes the existence of a property right, "procedural protections may be persuasive, for they suggest that there are factual issues which matter." Suckle v. Madison General Hospital, 499 F.2d 1364, 1366 (7th Cir. 1974).

Finally, the record in this case shows that, in fact, inmates are segregated for the reasons set forth in the regulations and the Procunier Affidavit. See Plaintiffs' Motion for Partial Summary Judgment and Preliminary Injunction, Exhibits 1-45. Although we have already noted that these reasons can be exceedingly vague and subjective, it is plain that they all do, in

fact, pertain to the safety of inmates or staff, and the general security of the institution. Rudimentary classification hearings or "meetings" are almost always held, and the affidavits filed by plaintiffs show that inmates have quite justifiably come to expect that they will remain in the general population unless prison officials conclude that they do pose a threat to the safety of other inmates or staff. [5/]

[5/] Certainly the result in this case should not turn on the discredited notion that fewer procedural protections (or none at all) ought to be accorded a prisoner who is segregated for "administrative" rather than for "disciplinary" reasons. See JS at 7,16. The better reasoned of the opinions which have discussed this point have concluded that, for due process purposes, there is no meaningful distinction between the two, since the effect upon the prisoner is generally the same. See, e.g., Carlo v. Gunter, 520 F.2d 1293, 1295-96 (1st Cir. 1975); Allen v. Nelson, 354 F.Supp. 505, 511 (N.D. Cal.), aff'd. 484 F.2d 960 (9th Cir. 1973); Landman v. Royster, 333 F. Supp. 621, 645 (E.D.Va. 1971); Gray v. Creamer, 465 F.2d 179 (3rd Cir. 1972). In point of fact, the record below plainly shows that prisoners segregated for "administrative" reasons are confined (1) for acts which are far more vague and (2) for periods of time which are much longer than is the case where "disciplinary" segregation is concerned, and therefore more procedural protection, not less, should attend determinations involving administrative segregation in California. See JS, Appendix at 17-18 (opinion below).

Since the District Court's reading of the state regulation is at the very least a "tenable" one, we submit that this Court should not disturb it on appeal. See Bishop v. Wood, 426 U.S. 341 (1976). In Bishop, where due process protection for an alleged state created right was also at issue, this Court held that a reading of state law by a locally experienced District Judge, deriving some support from a state court decision and accepted by the court of appeal was sufficient to "foreclose [this Court's] independent examination of the state-law issue." Id., at 347 (emphasis supplied). See also, Runyon v. McCrary, 427 U.S. 160, 181 (1976). Therefore the short answer to

the instant appeal is that an interpretation of California law by the three experienced Federal judges who sit in California does not warrant further argument in this Court. 6/

6/ In considering what process is due, the District Court rejected several of the safeguards proposed by plaintiffs, and instead limited its order to those required by this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). That, we submit, was a modest and reasoned response, especially in light of (1) the highly arbitrary and meaningless classification "hearings" heretofore given by appellants, as shown by the record below, (2) the court's conclusion that "[t]he deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge," and (3) the uncontroverted evidence that Wolff safeguards would be reasonable and even beneficial to the prison system. And although appellants' counsel now contend that the "District Court's ruling substantially impairs the discretionary powers of the State to administer its prison system" (JS at 12), the Director of the CDC testified that in disciplinary matters the Department was in compliance with Wolff even before Wolff came down.

The other answer is that, as we have shown, the lower court's determination of state law was plainly correct. And, once the District Court found that prisoners possess a state created right not to be segregated unless they pose a threat to themselves or to others, its judgment merely followed and applied settled decisions of this Court. For neither Meachum nor Montayne disturbed the holding in Wolff that such rights are protected by the Due Process Clause, and thus the holding of the court below was hardly "contrary" to those cases, as appellants claimed. 7/

7/ We believe that the lower court was also correct in finding a Fourteenth Amendment liberty right not to be segregated without good cause where, as here, (1) the conditions of confinement are so harsh and (2) such confinement substantially diminishes the likelihood of release on parole. However, we do not contend that that question is "unsubstantial" within the meaning of Rule 16 of this Court, and we therefore base the instant motion to affirm on the existence of a state created right.

II

THE MATERIAL FACTS UPON WHICH THE LOWER COURT'S DECISION IS BASED WERE UNCONTROVERTED BY DEFENDANTS

In support of their motion for summary judgment, appellees submitted 46 detailed affidavits executed by the named plaintiffs and members of their class, and also affidavits from expert penologists John Boone and David Fogel and psychiatrists Bernard L. Diamond and Frank Rundle. These affidavits described, at great length and in painful detail, (1) the reasons which were in fact given by the prison officials for placing these prisoners in segregation, (2) the type of notice, hearing, and decision which they in fact received, and (3) the conditions to which they were in fact subjected while in segregation. Appellants, however, did not even attempt to controvert a

single allegation in any of these affidavits. Instead, they merely submitted two affidavits executed by the then Director of Corrections, Raymond K. Procunier, which basically reviewed the pertinent provisions of the Department's Classification Manual (never disputed by plaintiffs), as well as certain conditions of confinement that were said to exist in the four segregation units in question. That was it. Only after judgment was rendered against them did appellants file four brief affidavits -- couched in virtually identical language, and signed by the wardens of the four institutions -- addressing themselves to certain conditions in the lockup units; stating that the Classification Manual procedures were being observed; and asserting that "parole considera-

tions are not denied to inmates on the basis that they are confined in a segregated housing unit."

Now, in a remarkable display of legal chutzpah, appellants claim that since the facts upon which the lower court's opinion was based were "controverted" within the meaning of Rule 56, F.R.Civ.P., summary judgment was improper. Such a contention, however, cannot withstand serious scrutiny for the following reasons.

Initially, we note that the set of four (virtually identical) affidavits by the wardens was not filed prior to judgment, but only in support of appellants' Rule 52/59 motions for reconsideration. As such, they were plainly untimely. See, e.g., Englehard Industries, Inc. v. Research Instrumental Corporation, 324 F.2d 347, 352 (9th Cir. 1963); cf. Sound Ship Building

Corp. v. Bethlehem Steel Co., (Inc.), 533 F.2d 96, 101 n. 3 (3d Cir. 1976), and authorities cited. Appellants offered no reason to explain why the affidavits could not have been submitted at some time during the two and one-half years prior to judgment, nor did they ever file a Rule 56(f) affidavit. In fact, the affidavits show on their face that they easily could have been filed at any time prior to the court's ruling on plaintiffs' motion for partial summary judgment. Nor did the affidavits purport to contain recent or newly discovered evidence. Therefore to permit such a belated showing would be to allow a party resisting summary judgment to simply hold back his evidence, see how the judgment goes, and then (if he loses) make a post-judgment

evidentiary showing that the court would have to honor.

Next, we note that both the Procunier affidavit and those of the wardens are written in terms of what the administrative procedures require, followed by conclusory allegations that some of those regulations are being followed. But the whole purpose of Rule 56 is to prevent a party opposing summary judgment from resting upon his pleadings and from opposing a specific, factual showing of the moving party with conclusory denials. Hence Rule 56(e) requires an opposing party's evidentiary showing to be factual and first-hand, rather than conclusory, in nature.[8/] None of appellants' six

---

8. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

affidavits even begins to pass this test. See, e.g., Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir. 1972); 10 Wright & Miller, Federal Practice & Procedure, §2738 at 695-96.

However, even if all six affidavits are given full consideration, the material facts upon which the judgment below is based are still supported by uncontroverted evidence. A close comparison of the allegations

---

evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), F.R.Civ.P.

in appellees' 50 affidavits with those of appellants' six readily discloses that most of appellees' specific allegations are nowhere disputed by defendants, even in conclusory terms. So far as classification procedures are concerned, defendant Procunier simply describes what existing procedures require; and the four wardens simply swear that existing procedures are being followed. But plaintiffs' affidavits state with specificity what in fact happened to them when they were put into segregated confinement. They show, as the court below observed (see, e.g., JS, Appendix at 11), that in fact many inmates were not given adequate notice or a written decision; and that for many if not most their classification "hearings" were brief, point-

less affairs at which the prisoner could do no more than "make an unsupported denial of the charges against him." Ibid.[9/] Surely a party cannot successfully avoid summary judgment, in a situation where nearly 50 affidavits document in detail the moving parties' claim of irregularity, by filing a conclusory affidavit that proper procedures are being followed. Rule 56(e), F.R.Civ.P. Such a result would in substance, be no different

---

9. Appellants also imply that there is no evidence to show that appellants' "amended" classification procedures--requiring notice, a hearing, and a written decision--had been violated. JS at 19. But a reading of the Procunier Affidavit (¶¶ 5-7, 10), shows that at the time plaintiffs' affidavits were executed the Classification Manual already required that such rights be afforded. Yet appellants never even attempted to controvert appellees' extensive and detailed showing, contained in more than 45 affidavits, that the requests were in practice being commonly ignored.

than the old Third Circuit rule allowing a party opposing summary judgment to rest on its pleadings, which Rule 56 was amended to overrule.[10]

So far as conditions of segregated confinement are concerned, there are many very specific allegations that none of defendants' six affidavits even touched upon. For example, allegations that cells are filthy and vermin infested, that there is a pervasive stench and a terrible noise level, and that prisoners undergo visiting in shackles, as well as others of a similar nature, are entirely unrefuted, even in conclusory terms. And the detailed, serious allegations of severe psychological harm--testified to by two distinguished psychiatrists--

10. See Advisory Committee Note to the 1963 Amendment of Rule 56(e), reprinted at 31 F.R.D. 587, 648-49.

stand entirely uncontroverted.

In any event, the only relevance of this testimony for purposes of the instant motion to affirm is that since the conditions in segregation are so severe, a prisoner's right not to be placed there cannot be considered de minimis. Surely that fact is amply documented by the whole of the record in this case, even if the six affidavits submitted by appellants are given the credence which, due to their untimely and conclusory nature, they do not deserve.

/

/

/

CONCLUSION

The holding of the three-judge District Court--that California law gives state prisoners a right not to be placed in segregated confinement unless they pose a threat to themselves or to others--is plainly correct, and the substantial facts upon which that holding is based are uncontroverted within the meaning of Rule 56. We therefore respectfully submit that appellants present no substantial question for decision by the Court, and that the judgment and decree of the District Court should be affirmed.

October 31, 1977.

Respectfully submitted,

B. E. BERGESEN, III
Counsel for Appellees